Supreme Court, U.S.
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No. 96-856

In The Supreme Court Of The United States

OCTOBER TERM, 1996

VINCENT MAXIMILIAN YEE, PETITIONER

v.

HUGHES AIRCRAFT COMPANY, LARRY SPICER, TERIAN DAY, GARY OSBORN, FRANK TAORMINA, STEVE DORFMAN, and SUE HUNTGATE, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did The Ninth Circuit Court Of Appeals Properly Decline To Consider Petitioner's Continuing Violations Theory When That Theory Was Raised For The First Time On Appeal And Was Not A Pure Question Of Law?

2. In Reviewing A Grant of Summary Judgment, Does The *De Novo* Standard Of Review Require A Circuit Court Of Appeals To Consider Theories Not Presented To The District Court?

LIST OF PARTIES

The Petitioner is Vincent Maximilian Yee.

The Respondents are correctly identified in the caption of the Petition with two exceptions: "Gay Osborn" is Gary Osborn and "Steve Dorman" is Steve Dorfman.

Hughes Aircraft Company's parent company, General Motors Corporation, has issued shares to the public, as have two of its affiliated entities, FLIR Systems, Inc. and Nippon Avionics Co., Ltd.

Wayne S. Flick of Latham & Watkins is counsel of record for all respondents, each of whom joins in this brief in opposition.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Hughes Aircraft Company, Larry Spicer, Terian Day, Gary Osborn, Frank Taormina, Steve Dorfman, and Sue Huntgate (collectively "Hughes" or the "Company") respectfully urge this Court to deny the petition for writ of certiorari in this case.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, is the only relevant federal statute. 42 U.S.C. § 2000e, *et seq.* (1994). In particular, §§ 2000e-3(a) and 2000e-5(e) of that law provide:

> e-3(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . . .
>
> . . .
>
> e-5(e) [I]n a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . .

STATEMENT OF THE CASE[1]

This is an action involving alleged employment discrimination against Petitioner on the basis of his race. Judge Mariana R. Pfaelzer of the Central District of California granted two substantive motions in this case: 1) Hughes' March 7, 1994 Motion for Partial Summary Judgment (the

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[1] Petitioner's "Statement of the Case," which is rife with evidentiary misrepresentations, is merely lifted from his Opening Brief in the Court of Appeals. As such, it refers to excerpts of the record ("ER") that were presented to the Court of Appeals, but which are not before this Court. The district court issued a detailed Statement of Uncontroverted Facts and Conclusions of Law, (*see Appendix to Petition for Cert.*, A-2 at 2-11), which the Court of Appeals did not disturb. Petitioner's recitation of the "facts," therefore, is inappropriate and should be disregarded. Respondents do not respond specifically to Petitioner's assertions.

"First Motion"); and 2) Hughes' June 27, 1994 Motion for Summary Judgment (the "Second Motion"), following which an "Order Granting Summary Judgment" was entered on January 9, 1995. Petitioner presented precious little in the way of evidence to overcome either of Respondents' motions; indeed, the district court gave him two opportunities to defeat the Second Motion because his first Memorandum in Opposition contained no pertinent evidence or argument at all. He thus had ample opportunity to present all evidence available to him, and to perfect any legal theories he believed applicable to the factual record.

In this Court, as he did in the Ninth Circuit, Petitioner contends that summary judgment was improperly granted because the evidentiary record supports a finding of continuing violations. At no time in the district court did Petitioner raise the continuing violations theory, however. *See Yee v. Hughes Aircraft Co.*, No. 95-55204, mem. op. at 3 (9th Cir. 1996), *reprinted in Appendix to Petition for Cert.*, A-3.[2] Indeed, Petitioner himself made discovery into his time-barred allegations unnecessary by conceding in opposition to the First Motion that the performance appraisals that were the subject of those allegations were not at issue. The factual record relating to those appraisals, therefore, was never fully developed in the district court. *See id.* at 3-4. ("Because the absence of a continuing violation assertion resulted in a record which was not properly developed in the district court on that point, we decline to consider the issue.") After putting to rest any question that those appraisals were at issue, Petitioner never sought to revive them until he reached the Ninth Circuit.

Petitioner does not seriously contend that he argued the continuing violations theory to the district court. *See*

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[2] The Ninth Circuit's memorandum opinion in this case is unpublished.

Petition for Cert., 28 ("Mr. Yee appealed the ruling and raised a new legal theory"). Nor does he credibly dispute that his own concessions in the district court rendered unnecessary any consideration of the facts underlying his time-barred allegations. Rather, he urges that the Ninth Circuit should have considered his newly-raised theory, despite the inadequate record to which he sought to have that theory applied, because the theory involves a pure question of law. He also contends that this Court should grant certiorari in this case to guarantee consistency among the circuit courts on this point. *See Petition for Cert., 21* ("This Court should announce a rule that recognizes the legal theory exception to the general rule so that there is consistency among the circuits . . ."). Contrary to his suggestion, however, consistency already exists.

Setting aside the time-barred allegations, Petitioner's discrimination and retaliation allegations relate only to his November 1992 layoff. The district court found that Respondents articulated a legitimate, lawful explanation for Petitioner's layoff (*i.e.*, adverse economic conditions), and that Petitioner presented no evidence of pretext. The Ninth Circuit agreed. *See* mem. op., 5 ("Assuming that Yee established a prima facie case, Hughes spelled out [a] non-discriminatory reason for the layoff . . . Yee failed to present evidence of pretext.), and 6-7 ("Hughes rebutted any inference of discrimination by demonstrating that Yee was chosen as one of the employees to be laid off based on skill, performance and company needs. Because Yee failed to submit evidence to demonstrate that Hughes' reasons were pretextual, summary judgment was proper."). Petitioner contends that this finding is erroneous because his time-barred allegations, which both courts below declined to consider, provided the evidence of pretext necessary to overcome summary judgment. Respondent urges that the basis of the

lower court's determination was sound. *See* mem. op., 6 ("The common thread which could connect his prior Title VII action and his court-ordered reinstatement with his current termination was severed when he failed to argue that there was a connection between that earlier action and the current layoff. We decline to mend the thread on appeal.") There are no grounds for granting the Petition.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Introduction.

Every federal circuit has held that theories raised for the first time on appeal will not be considered. Every circuit also recognizes a narrow exception to the general rule, where the newly raised theory involves pure questions of law. Thus, there is no split in authority requiring this Court's attention, and the exception the Petitioner asks this Court to announce for consistency's sake is already in place in every circuit.

Moreover, the continuing violations theory is not one to which the "pure question of law" exception applies. In order to determine whether a continuing violation exists, a court must evaluate events or conduct inside and outside the relevant statute of limitations, and determine whether they are sufficiently related to revive the otherwise time-barred allegations. This analysis necessarily entails factual questions. Thus, even if a split in authorities existed, and even if the Ninth Circuit was among the circuits that did not recognize the exception for pure questions of law,[3] this case would present no opportunity to bring about change.

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[3] The Ninth Circuit first recognized the exception in *Golden Gate Bridge & Highway Dist. v. United States*, 125 F.2d 872, 875 (9th Cir.), *cert. denied*, 316 U.S. 700 (1942), and has reaffirmed it in several recent cases. *See, e.g., Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 1996 U.S. App. LEXIS 33863, at *37 (9th Cir. Dec. 27, 1996) ("'We will

Finally, Petitioner's strained interpretation of *de novo* review finds no support in the decisions of any Court. Petitioner merely invites this Court to overturn the principle, well-established in every circuit, that appellate courts need not consider theories raised for the first time on appeal. Nothing about this case warrants such a drastic and imprudent change in the law.

II. There Is No Circuit Conflict On The Question Whether A Theory Must Be Considered For The First Time On Appeal.

The Ninth Circuit refused to consider Petitioner's continuing violations theory because Petitioner did not present it to the district court; it was raised for the first time on appeal. As a general rule, circuit courts will not consider such arguments. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Dillingham Constr. N.A. v. Arceo*, 57 F.3d 712, 717 (9th Cir. 1995) (refusing to consider an argument for the first time on appeal that was not raised in the district court) (citing *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985)), *cert granted, California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, ___U.S.___, 116 S. Ct. 1415 (1996).

Despite Petitioner's assertion to the contrary, every Circuit Court of Appeals recognizes an exception to this

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review an issue that has been raised for the first time on appeal under certain narrow circumstances,' including 'when the issue is purely one of law.'") (citing *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995); *United States v. Conkins*, 987 F.2d 564, 568 (9th Cir. 1993) (same); *United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991) (same)); *see also United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) ("Our circuit apparently has recognized a second, narrow exception to the general rule. When the issue . . . is purely one of law") (citing *Golden Gate*, 125 F.2d at 875).

general rule.[4] When the issue raised is "purely one of law and does not depend on an inadequately developed factual record," circuit courts have discretion to consider it. *Marbled Murrelet v. Babbit*, 83 F.3d 1060, 1063-64 (9th Cir. 1996); *see, e.g., United States v. Martinez-Cortez*, 988 F.2d 1408, 1415 (5th Cir.) ("An exception [to the general rule of non-reviewability] is usually made when the newly raised issue concerns a pure question of law"), *cert. denied, Martinez-Cortez v. United States*, 510 U.S. 1013 (1993); *USX Corp. v. Tanenbaum*, 868 F.2d 1455, 1459 (5th Cir. 1989) ("Although we do not ordinarily consider an issue raised for the first time on appeal, an exception exists when "a pure question of law is involved"). Petitioner's continuing violations theory does not fall within this exception, however, nor does he cite to a decision by this or any circuit court that holds otherwise. Even if Petitioner's newly-raised theory fell within the narrow exception, the Ninth Circuit was not required to consider it.[5]

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[4] *See United States v. Newman*, 982 F.2d 665, 672 (1st Cir. 1992), *cert. denied, Newman v. United States*, 510 U.S. 812 (1993); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993), *cert. denied*, ___U.S.___, 114 S. Ct. 1612 (1994); *Estate of Kunkel v. United States*, 689 F.2d 408, 414 n.5 (3d Cir. 1982); *Childers v. Chesapeake & Potomac Tel. Co.*, 881 F.2d 1259, 1263 n.1 (4th. Cir. 1989); *United States v. Martinez-Cortez*, 988 F.2d 1408, 1415 (5th Cir. 1993); *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 544-45 (6th Cir. 1996); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 38 F.3d 1429, 1439 (7th Cir. 1994); *Shands v. Kennett*, 993 F.2d 1337, 1343 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994); *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 1996 U.S.App. LEXIS 33863, at *37 (9th Cir. Dec. 27, 1996); *LaMure v. Mutual Life Ins. Co.*, 1997 U.S.App. LEXIS 537, at *8-9 (10th Cir. Jan 14, 1997); *Skinner v. City of Miami*, 62 F.3d 344, 348 (11th cir. 1995); *National Recycling Coalition, Inc. v. Reilly*, 884 F.2d 1431, 1437 (D.C. Cir. 1989); *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1531-32 (Fed. Cir. 1995).

[5] Whether to entertain an argument first raised on appeal is a decision within the discretion of the appeals court. Recently the Ninth Circuit

The "pure question of law" exception to the general rule that circuit courts will refuse to consider arguments raised for the first time on appeal is plainly inapplicable in this case. Despite Petitioner's apparent confusion, identifying a purely legal question is a rather elementary undertaking. Simply put, if in reviewing the issue, the circuit court is not required to interpret the factual record, and need only apply a given body of law, then it may consider the issue under the "purely legal question" exception.[6]

Title VII requires a plaintiff to file a charge of discrimination with the EEOC within 300 days of the alleged act of discrimination if he previously files a charge with the equivalent state or local agency, and 180 days if he does not. 42 U.S.C. § 2000e-5(e). *See Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 903-04 n.2 (1989). Under the continuing violations theory, however, a plaintiff who establishes that a continuing policy and practice of discrimination operated within the statutory period, even though certain events fell

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explained that it had *"discretion* to review issues raised for the first time on appeal if to do so would not require the development of new facts." *United States v. Tisor*, 96 F.3d 370, 378 (9th Cir. 1996) (emphasis added) (citing *Andersen v. Cunning*, 827 F2d 1303, 1305 (9th Cir. 19878)); *see also Singleton v. Wulff*, 428 U.S. 106 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals . . .") (citing *Turner v. City of Memphis*, 369 U.S. 350 (1962)). In this case, even if Petitioner had raised a new, purely legal issue, reasoning from its own holding in *Flores-Payon*, the court might well have opted not to consider it because of the prejudice to Respondents of doing so. *See Flores-Payon*, 942 F.2d at 558 ("The general rule is supported by considerations of fairness and judicial efficiency.").

[6] *See, e.g., Fry v. Melaragno*, 939 F.2d 832, 835 (9th Cir. 1991) (holding that whether officials of the Internal Revenue Service enjoyed absolute immunity is a purely legal question); *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980) (finding that the conflict of laws issue is one of pure law, requiring no factual analysis whatsoever).

outside the statutory period, may satisfy the filing requirements. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980) (holding that continuing violation existed only after plaintiff showed that a "policy of discrimination" occurred "each day of her employment"). Thus, evaluating the existence of a continuing violation demands careful development and interpretation of the factual record.

At summary judgment, a Title VII plaintiff must raise a triable issue as to whether a current violation exists (*i.e.*, one within the limitations period). He must then demonstrate that conduct or events outside the statute of limitations are sufficiently related to the current violation to justify extending the reach of the statute. *See, e.g., Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995) ("[T]o assert a successful continuing violation claim, the facts alleged to have occurred within the [limitations] period must be 'related closely enough' to the prior acts such that they are to be considered one ongoing violation. . . . In other words, there must be a sufficient nexus. . . .") (citation omitted). However, Title VII courts have long regarded certain acts as sufficient to begin the running of the statue of limitations, such that a plaintiff may not avail himself of the continuing violations theory to resuscitate stale claims based on those acts. *See London v. Coopers & Lybrand*, 644 F.2d 811, 816 (9th Cir. 1981) ("[a]bsent special circumstances, a single act by an employer adverse to an employee's interests, such as a discharge, layoff, or failure to transfer or promote, begins the running of the statute of limitations and the natural effects of the allegedly discriminatory act are not regarded as 'continuing.'").

Petitioner urges that determining the existence of a continuing violation may be done without resort to and evaluation of the factual record. He is in error. The Ninth Circuit could not possibly have determined the existence of a

continuing violation without closely scrutinizing the evidence in the district court record. Petitioner's continuing violations theory is, at best, a mixed question of fact and law and wholly inappropriate for consideration at the appellate stage. Furthermore, even if it had been inclined to indulge Petitioner, the Ninth Circuit would have been impeded by an incomplete record for which Petitioner is himself responsible.

III. The Ninth Circuit Properly Applied The *De Novo* Standard Of Review.

Petitioner argues that the Ninth Circuit erred by refusing to reverse the district court's judgment based upon an argument he raised for the first time on appeal. In support of this assertion, Petitioner contends that circuit courts of appeal must reverse a summary judgment ruling based upon a theory not relied upon by the district court if the same circuit court also would affirm summary judgment under similar circumstances. *See Petition for Cert.*, 23-28. To its detriment, Petitioner's analysis simply ends there. Petitioner offers no authority to support his novel theory.[7]

Petitioner's theory of *de novo* review, while inventive, is nonsensical and should be disregarded. First, it finds no support in any decision of this Court or of any circuit court. Second, the cases that Petitioner cites as examples demonstrate a logical and fatal flaw in Petitioner's analysis.

Petitioner argues that if a circuit court will affirm summary judgment based on an altogether new theory, then it should also reverse based on a new theory. Petitioner's conclusion is wrong, however, because it flows from a false

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[7] The only authority that Petitioner does cite in favor of his contention comes from the syllabus of *Salve Regina College v. Russel*, 499 U.S. 225 (1991). *See Petition for Cert.*, 27. Petitioner cites to this syllabus in a perplexing discussion of the decisional accuracy of appellate courts.

premise: a court of appeal typically will *not* affirm on the basis of a newly-raised theory. *See* Section II., *supra*. Petitioner cites two cases to bolster his argument, but in neither case did the circuit court affirm based on a theory raised for the first time on appeal. In *Church of Scientology v. Cazares*, 638 F.2d 1272 (5th Cir. 1981), the Fifth Circuit affirmed summary judgment because it agreed with the district court that there were no genuine issues of material fact, even though the district court applied the wrong legal analysis to reach that conclusion.[8] In *Helena Rubinstein, Inc. v. Bau*, 433 F.2d 1021 (9th Cir. 1970), the Ninth Circuit affirmed summary judgment on a theory that was before, but not relied upon by the district court. The court considered no new arguments in its decision. *See Rubinstein*, 433 F.2d at 1023 ("[T]he ground upon which we rely was squarely presented to the trial court").

The true premise that can be derived from Petitioner's cited cases is merely the hornbook principle that a circuit court will affirm summary judgment if a theory raised below, but not relied upon by the district court, will support that judgment. Petitioner's proposed corollary theory that circuit courts should rely on altogether new arguments to reverse summary judgment makes no sense. Merely because a court will affirm summary judgment on an argument not relied upon by the district court, it does not follow that a court should reverse summary judgment based on an argument raised for the first time on appeal. In fact, the *Rubinstein* court stated explicitly that "[t]he general rule is that we will not consider, as grounds for reversal, contentions that were

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[8] Whereas the district court entered summary judgment because it felt plaintiff lacked standing to bring the suit, the Fifth Circuit affirmed because, upon review of the factual record, it found no genuine issues of material fact. *See Church of Scientology*, 638 F.2d at 1284.

never presented to the trial court." *See id.* at 1024 (citations omitted). There are no grounds upon which this Court should grant certiorari.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted.

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January 31, 1997

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-55204

C.D. No. CV-93-903-MRP

VINCENT MAXIMILIAN YEE, PLAINTIFF/APPELLANT,

v.

HUGHES AIRCRAFT COMPANY, LARRY SPICER, TERIAN DAY, GARY OSBORN, FRANK TAORMINA, STEVE DORFMAN, and SUE HUNGATE, DEFENDANTS/APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARIANA R. PFAELZER, PRESIDING

TRANSCRIPT OF PROCEEDINGS

JULY 10, 1996

APPEARANCES OF COUNSEL:

For Plaintiff/Appellant:

HUTH, LYNETT & SCUDI
Morgan J.C. Scudi

For Defendants/Appellees:

LATHAM & WATKINS
Wayne S. Flick

JUDGE FERNANDEZ: I'd like to say that we are honored to have Judge Merhige from the Eastern District of Virginia here to help us give you speedy justice on the calendar. It really is an honor to have him with us.

JUDGE MERHIGE: Thank you. It's an honor to be here.

JUDGE FERNANDEZ: The one case on the calendar today -- is this working? It's all right? Okay. The one case on the calendar today, the matter of Colbertson v. Schubert, is scheduled to be submitted on the briefs. It will be ordered submitted on the briefs at this time.

Counsel, there is a clock there, I think, and if you all would try to watch the clock for your timing, I will try, when there's about two minutes of your time left, to do something like this. It neither means peace nor victory; it simply means you got two minutes left. I may forget. I might get so tied up in your argument that I forget about it or you may be looking somewhere else. So watch your own time. But I will try to give you a little hint when you've got just two minutes left.

The first case is Yee v. Hughes Aircraft. You may proceed.

MR. SCUDI: I'd request to reserve five minutes for rebuttal.

JUDGE FERNANDEZ: Watch your time and save it. I won't tell you when you're getting close to your five minutes, but watch your time and save it, and it's just fine. You may proceed.

MR. SCUDI: Thank you. May it please the court, this is a Title VII termination case in which the appellant seeks reinstatement. It's brought by a citizen of the United States of Korean and Chinese heritage, Mr. Yee. We also have a

breach of employment contract cause on appeal, and we have a breach of the implied covenant of good faith and fair dealing, also on appeal. We believe, in terms of the facts below, this was granted on summary judgment so it is de novo before the court; that we have established, at least in terms of triable issues of fact, that there has been discrimination and retaliatory discharge against Mr. Yee by Hughes. And we have overcome the hurdle of the reduction in force in that it is offered as a pretext, and we believe we have established facts sufficient to go to trial on those issues.

Also on appeal is an issue with regard to the jurisdictional limit of the Title VII claim. The court should be aware from the briefs that Mr. Yee was reinstated by district court order in 1989 for prior discrimination, which specifically was found to have been -- have included the wrongful changes of the appraisal evaluations by the department of human resources in order to effectuate that termination.

JUDGE FERNANDEZ: But the ultimate conclusion was not changed, was it? They changed the phraseology. They didn't change the ultimate conclusion.

MR. SCUDI: Your Honor, we're now -- I'm just going back in history in terms of the 1989 ruling of the district court where they reinstated Mr. Yee to Hughes. And at that time what they found was that Hughes had discriminated and that the human resources department, the head of the human resources department, had altered his evaluations and appraisals in a discriminatory manner in order to terminate, and therefore he was ordered reinstated in 1989.

So it's in that context that this case begins.

So we have Mr. Yee reinstated to Hughes in 1989 with an admonition that he's not to be discriminated against

and that he can only be terminated for just cause. And now we are looking at from 1989 until -- rather, May of 1989 until 1992, September of '92, when Hughes provided a layoff notification.

So the entire framework within terms of this case is -- involves three evaluations: 1989, 1990 and 1991. We believe that we have shown a continuing pattern on the part of Hughes with regard to the evaluations because they used the evaluations in the ratings given to Mr. Yee in the term- -- ultimate termination decision.

JUDGE FERNANDEZ: Here's the thing that I think you have -- one needs to focus on, though, or you need to focus on.

At the district court level on -- let's say on the termination level, the paperwork and the argument presented to the district court did not say that. It said, as far as I can read it, that the retaliation was retaliation for filing his later 1992, I think it was, claim. It didn't make the argument to the court that that was the situation. As a matter of fact, on their summary judgment motion, it seems to me the only argument made was: Well, you should have chosen someone else. I think it was, like, a three-page response, and it said: You should have chosen someone else. That's kind of by way of saying: I understand your argument to us now, what you're saying now.

MR. SCUDI: Yes.

JUDGE FERNANDEZ: The problem is -- or the thing that, you know, you need to sharpen is: How do we know that that's what was in front of the district court? In order words, the court was told: The problem with this termination is that you've discriminated against Asians in general, and maybe there was somebody else you should have terminated instead.

And the court said: No, that's just not true. That's not demonstrated. And it ruled. Why should we go beyond that in considering this case, or would we be going beyond that if we consider it?

That was a whole lot of questions at once. Would you like me to break it up?

MR. SCUDI: I know. I will try to address that, if I may, and I think it's a very important issue.

Here, I think, we are dealing with fundamental rights, and I think that the record that we have in front of the court of appeals is exactly the same record that was in front of the trial court. Obviously, we have different counsel, and hopefully our briefs are a little more sufficient. However, the facts were there. They were all there. All of the ones that we rely on were in front of the court. And this court is reviewing against its summary judgment, and it's on the causes of action as pled. All of the causes were pled in the EEOC complaint; and in the cause of action, retaliation was alleged in the termination, and not the retaliation that may have been covered in the brief, but it was in the complaint.

JUDGE FERNANDEZ: Well, let me put it more sharply then.

Is it your position that when one is faced with a summary judgment motion in district court, and we have this great infrangible mass of facts and evidence and stuff out there, and the person goes to the district judge and says, "Judge, my argument is my opposition to summary judgment is X," and the judge says, "I'm sorry, you lose," is it your position that in that situation, then, you kind of use that as a pass key and now you come to the court of appeals and you go back into the whole mass and you say, "I've got Y, Z, A, B and C that I want you folks to decide ab initio on summary

judgment." Is that your position, that that's an appropriate -- never mind the word appropriate. Is that your position?

MR. SCUDI: It is my position, Your Honor --

JUDGE FERNANDEZ: Okay.

MR. SCUDI: -- that the court has jurisdiction to do that. The rules are quite specific in terms of the record below that the court may rely upon. Also, I believe in our reply brief we cite to the fact that, with regard to a fundamental right, the court has a broad power to do some justice here. And we're not asking the court to go outside of what was before the trial court. We are asking the court to go outside what was in the brief of the attorney representing the appellant.

JUDGE FERNANDEZ: In other words, you are saying that if one looked at this whole case on both pieces of the summary judgment, one can trick out -- and I don't mean that in a negative sense -- but one can trick out a continuing violation claim stemming from the original district court Title VII case; and when one tricks that all out, one can bring in the 1989 and 1990 activities, and one can bring it all the way forward and say this termination is really a piece of that; right? That's your position?

MR. SCUDI: That's correct. That's precisely our position.

JUDGE FERNANDEZ: I understand it.

MR. SCUDI: Okay. And we believe that it is a continuing violation. I think, touching on that point --

JUDGE MERHIGE: You are telling me that it may well be. That thought occurred to me as I read the briefs. But the trial court was never informed that there was any contention of that. There's one statement in there, I believe, that said they've always been -- they've always discriminated,

something to that effect; but the court had no opportunity to rule on whether it was a continuing violation. I realize it was pro se, I believe.

MR. SCUDI: On the matter of the notice of appeal, he was represented --

JUDGE MERHIGE: Well, there's even less excuse then.

MR. SCUDI: Well, Your Honor, but if you review the declarations of Vincent Yee, that is where the facts are laid out. All of the facts that are necessary to rule --

JUDGE MERHIGE: Why didn't they say that to the trial court?

MR. SCUDI: But that -- they were supplied to the trial court. They weren't covered in the brief. Counsel for Hughes is very sophisticated and has given you the rather --

JUDGE MERHIGE: Well, you are not bad yourself.

MR. SCUDI: Well, thank you, Your Honor.

But my point is, you know from sitting on the bench that when you have a brief and you have declarations, the Hughes declarations here in California instead of affidavits, that you rely on the brief and the argument of counsel, but you go right to the declarations. The first thing you should be looking at are the facts that's before you. What is it that you're considering in terms of granting summary judgment? And as a jurist, when you read the facts that are laid out here, the declarations of Vincent Yee that were presented to the court, the evaluations and all of those facts that were in front of the court were sufficient; that sitting alone and reading them, you wouldn't know that summary judgment was not proper.

Now, counsel's brief may have been two or three pages, but it relied upon the declarations. And we have

submitted in our appendix those very same declarations, and all of the declarations that were supplied to the court are the ones that we rely on in our brief. So the judge, in looking at the summary judgment, had the very declarations that we're arguing here. What the judge did not have was the benefit of, shall we say, an exhaustive brief on the subject. But he or she certainly had all of the facts. And he or she, having the facts in front of it, and I believe it was a she, certainly had the power to look with a careful eye at the argument that was being made by Hughes because it's disputed facts that give rise to a denial of a motion for summary judgment.

JUDGE FERNANDEZ: Well, the difficulty is, structurally, you know, I know we're talking about this wonderful thing of jurists with incredible amounts of time to ferrite everything out; but, you know, everybody depends on lawyers to tell them what the issues in the case are. And I am sure Judge Pfaelzer, who is an incredibly good and an incredibly precise judge, depended on, you know, something, I suppose, like this: You can look in an -- in the whole world, you can look at a mass of facts, but somebody has to tell you what the issues are; and if nobody is disputing particular issues, that's a problem.

Let me ask it this way: If we adopt your position, then I think you would say it's pretty clear we need to reverse. If we do not adopt your position, what's clear then?

MR. SCUDI: An un- -- that an unjust result occurs.

JUDGE FERNANDEZ: In other words, we should not reverse. We would -- in your view, we would adopt an injustice; but we if we didn't say it can now be resurrected now, is it pretty clear -- I'm not -- you don't have to give this up; I won't take it as an admission; but is it fairly clear that these issues weren't really presented to the district judge?

MR. SCUDI: I believe they were presented.

JUDGE FERNANDEZ: Okay.

MR. SCUDI: I believe every one of the issues were presented to the judge, albeit not in --

JUDGE FERNANDEZ: Well, I mean, as opposed to in -- that the facts should have just emanated like a miasma rising out of the facts, the judge should have known it.

MR. SCUDI: No, I believe that if you look at the complaint and if you look at the pleadings, every single issue is raised. They were not raised, you know, and I think the court, in reviewing issues, knows that they -- at least they were raised. They were raised in the brief and they were raised in the declarations and they were raised in the complaint. And so we don't have an issue --

JUDGE TASHIMA: When you say "raised," you mean the brief says: "We contend that there was a continuing violation"?

MR. SCUDI: There is at least the mention of the continuation, yes. Either that -- either in the brief or in the oral argument.

JUDGE TASHIMA: One of the things you didn't -- maybe we can attack this differently.

Another reason for requiring, you know, some kind of notice of the issues you're raising is to give the other side a chance to file opposition. In other words, if it's not fairly raised, the party won't file opposition. Who knows what kind of affidavit the other side might have filed if they thought an issue was raised that they thought was not raised.

Now, but you have not really replied directly to the argument made by your opponent on page 17 of their brief, which cites the general rule about the appellate court not

considering an issue unless it was expressly raised and considered by the trial court. You want to reply to that now?

MR. SCUDI: Yes, Your Honor.

JUDGE TASHIMA: Are you saying we should disregard that rule or it doesn't apply?

MR. SCUDI: Your Honor, in our reply brief, I believe we addressed that.

JUDGE TASHIMA: You mention none of those cases at all. You never mention Singleton, Brooks, Whittaker, Scott.

MR. SCUDI: Well, I believe we cited Silver v. Mendel out of the Third Circuit, and we cited United States v. Yee --

JUDGE TASHIMA: You're saying we should disregard Ninth Circuit law and involve the Third Circuit?

MR. SCUDI: I would never suggest that you disregard Ninth Circuit law, Your Honor.

JUDGE FERNANDEZ: I'm sorry?

MR. SCUDI: I would not suggest you disregard Ninth Circuit law. What I would suggest, Your Honor, is that the -- you know, I'm going to reserve some time, Your Honor. I'm going to look on my rebuttal, if you wouldn't mind. I'll address that issue.

JUDGE FERNANDEZ: Surely.

MR. SCUDI: Thank you.

MR. FLICK: Good morning, Your Honor. Wayne Flick of Latham & Watkins on behalf of Hughes. If you'll forgive me, I have a little bit of a cold this morning.

May it please the court, as much as anything else, this is a case about rules. And I believe that there is actually one rule about which the parties agree. At page 10 of Mr.

Yee's reply brief, he cites to this court's 1994 decision in Schneider v. San Diego, which in turn relies upon the court's 1990 decision in Brogun v. San Mateo. And as Mr. Yee points out, and as those cases hold, this court's review is limited to the record that was presented to the district court at the time of summary judgment. And if I may also refer to what many of us, Judge Tashima, regard as the Bible, there is a statement in the Federal Practice Guide which says that the court is not obligated to consider matters not specifically brought to its attention. It is immaterial that helpful evidence may be located somewhere in the record. And I think that really goes to the heart of this case and it's critical to the outcome.

JUDGE FERNANDEZ: You notice the word "obligated" that you just said to us.

MR. FLICK: Yes.

JUDGE FERNANDEZ: Suppose we say, "Oh, well, we may not be obligated, but we surely aren't disempowered," and I say suppose by way of posing a question that I pose the reverse of to opposing counsel. Suppose we did say, "Oh, well, we can figure out a continuing violation from the facts of this case, and we can figure out that there is some evidence to suggest that if one only presented the issue properly. And so that's what we think was going on here." What happens then to your side of the case?

MR. FLICK: May I answer that question, Your Honor, by addressing some of the specific issues that I think this court would then have to look to if it were going to disregard that?

JUDGE FERNANDEZ: Sure, as long as you answer the question.

MR. FLICK: Yes, I will. I hope so.

Let me start first with the 1989 and 1990 performance appraisals.

JUDGE FERNANDEZ: Right.

MR. FLICK: As we've said in our brief, they were time barred by the time Mr. Yee filed his first EEOC charge. In order to resuscitate them, the court would have to apply the continuing violations doctrine, which I believe was raised for the first time on appeal. Even, however, if the court decided to do that -- whether or not the court decides to do that, I think that there is a more compelling reason why the court should disregard those performance appraisals, because in the court below, in response to the first summary judgment motion, Mr. Yee unambiguously conceded any issue of discrimination with respect to those two performance appraisals. At page 3 of his opposition memorandum, which is contained in supplemental excerpts number 3, he says -- and mind you, this in the midst of discussing the promotion -- or the alleged promotion decision with respect to Mr. Tormina's division -- he says, "Please note that there are no other parts of his complaint which allege that he was also discriminated against by defendants in 1989 and 1990." No other parts.

Now, in reliance on that, Hughes, in its reply memorandum, said to Judge Pfaelzer, summary judgment is not necessary with respect to those two performance appraisals. We also submitted an amended statement of proposed uncontroverted facts which now omitted any reference to them. And Judge Pfaelzer, in her order granting summary judgment, crossed out the portion of that order, which we had proposed, which related to those performance appraisals. I cannot -- I think it's difficult to imagine a clearer case of conceding an issue than what Mr. Yee did with respect to those two performance appraisals.

JUDGE FERNANDEZ: Then there's the promotion.

MR. FLICK: Pardon?

JUDGE FERNANDEZ: Then there's the promotion. The 1990 promotion?

MR. FLICK: Then there's the decision with respect to the promotion.

Now, again, the district court applied Delaware State College v. Ricks to conclude that the statute of limitations began running at the time that decision was made and at the time it was communicated to him, which was in May of 1990. He didn't file his first EEOC charge until over two years later.

There's a decision which is -- was not brought to the attention of the district court, and it is inexplicably omitted from my brief as well. It's this court's 1994 decision in Fobbs v. Holy Cross Health System. It's at 29 F.3d 1439.

JUDGE FERNANDEZ: Give us a so-called gum sheet on that, will you please?

MR. FLICK: It's simply --

JUDGE FERNANDEZ: Give the clerk --

MR. FLICK: Oh, yes. Sure.

JUDGE FERNANDEZ: Give the clerk a little paper that has that written out, and then we'll have it. That's how we take additional things.

MR. FLICK: Certainly. In Fobbs, the Ninth Circuit applied Delaware State College v. Ricks in a context that is very similar to what was presented to the Supreme Court in Ricks and said that the statute of limitations begins to run when a decision such as a promotion or a transfer is made and communicated, and that the use of an internal grievance procedure does not in any way toll that statute of limitations.

I think those two cases make clear that the issue of that decision was time barred. However, if the court then decides that it's appropriate to apply the continuing violations theory, to resuscitate any allegation with respect to that decision, I think what this court said in Coopers & Lybrand, which is cited in our brief, disposes of that issue. This court said that, absent special circumstances, a single act by an employer, such as a discharge, a layoff or a failure to transfer or promote, begins the running of the statute of limitations; and any effects of that allegedly discriminatory act are not to be regarded as continuing. And that's because a decision such as a failure to promote or to transfer or a layoff or a discharge is a discrete decision. One reasonably should know at the time a decision like that is made and implemented that it was discriminatory, if in fact it was. And it is incumbent upon the person involved to file a charge and to file a lawsuit.

So now whether the court decides that in fact Judge Pfaelzer was correct in applying Ricks and simply found that decision to be time barred or whether the court decides to apply the newly raised continuing violations theory here, I think under this court's precedence, the continuing violations theory won't save that decision, and therefore it should not be considered.

That then takes us to where Your Honors began with Mr. Scudi, with the layoff and what was presented to the district court in the second motion. You've read the two-page opposition memorandum to our summary judgment motion, and I know that that was the second opposition memorandum.

Over Hughes' objections, Judge Pfaelzer permitted Mr. Yee, at the hearing on that motion, two more weeks to provide another opposition memorandum because his first was nonresponsive. That brief does not argue continuing violations; it does not argue retaliation. And I would note,

Your Honor, that the only place I see retaliation anywhere in the record below is in the introductory paragraph of the complaint. It is never elsewhere argued. The only thing Mr. Yee said in that opposition memorandum was that he should have been compared to different people for the purposes of the layoff.

I think in certain respects, Judge Merhige, this is much like the case that was presented to you in 1994, the Travelers decision, where you noted in that decision that in a case such as this, in order to rebut the defendant's legitimate non-discriminatory reason, the plaintiff has to -- applying the Supreme Court's decision in Hicks, the plaintiff has to show that the articulated reason was false and show that the decision was in fact based upon discrimination. And you noted in a footnote on that decision, Your Honor, that the plaintiff had admitted that there was no direct evidence of discrimination.

In our opposition brief at page 31, I quoted from a passage -- I quoted a passage from Mr. Yee's deposition.

> "Q I'm asking you about the facts that support your allegation, not about what might have happened or what could have happened. So I'd like to know what facts you are aware of that supports your allegation that you were discriminated against when you were laid off in November 1992.
>
> "A I don't recall at this point. I don't recall."

Well, apparently when he filed his opposition memorandum, he didn't recall either, because he didn't present any evidence to the district court.

JUDGE FERNANDEZ: Well, suppose he says now: Look, Judges. Here's what happened. Judge Pfaelzer ordered me reinstated way back when, in that other Title VII action, so

we know these folks are bad actors. They had to be beat up once and we're back at it again. Now, when they came to make their layoff decision, the layoff decision was based upon my evaluations, my record and such.

MR. FLICK: Sure.

JUDGE FERNANDEZ: And every one of those would go down like this: First, I get a bad evaluation and it's really because I squawked the first time. Then I get a second bad evaluation because I squawked the second time. And now I got a third one 'cause I squawked a third time. And so I've got a bunch of junk in my file that makes me look bad, and so I got laid off. And all of that is based upon this continuing violation of my rights. Each time they're discriminating against me, and the ultimate discrimination becomes when they lay me off.

And that's his argument. What do you want to say to that?

MR. FLICK: Let me respond in two ways. Number one, it is, of course, not an argument that was presented below. But more importantly, let's look back -- forget all of my legal arguments and let's look back at the substance of those appraisals.

The first two appraisals, the 1989 and the 1990, Your Honor, you just characterized them as bad. He received overall evaluations of "meets Hughes' expectations." There's no dispute that, substantively, his performance was good. Both of his supervisors, who authored both of those evaluations, I think, candidly knowing Mr. Yee, rightly concluded that he was difficulty with authority, he was argumentative, he was resistant to any sort of constructive criticism; and as he even said in his deposition, he always believed that he did the job just as well as the CEO could do

it. And that was the demeanor with which he approached all decisions and contacts with managers. And --

JUDGE FERNANDEZ: "Meets expectations," like a C; right?

MR. FLICK: Pardon?

JUDGE FERNANDEZ: "Meets expectations," if we were in an old-fashioned school setting, that's like a C; right? And then you could get a B, which is a little higher; and you can get an A; or you could get a D, which means that you're on the verge of flunking out.

MR. FLICK: Or an F.

JUDGE FERNANDEZ: Or an F; right?

MR. FLICK: That's correct.

JUDGE FERNANDEZ: So "meets expectations" is sort of a C.

MR. FLICK: That's correct.

And Susan Goland, the human resources consultant who ultimately passed on the layoff, tells the court in her declaration that a "meets Hughes' expectations" is average. Mr. Yee, on the other hand, contends that it's somehow a blacklist. There's no evidence in the record.

So I would first say that those two performance appraisals were not bad appraisals, and there's no real evidence that there was any effort, either by Mr. Brown or by Mr. Bilderback, to downgrade him because of the former lawsuit.

At most, I think what we have here is a difference of opinion between Mr. Yee and those two supervisors with regard to the overall quality of his performance. And I think that explains why, in the district court, he conceded any issue

of discrimination in those two evaluations. I think it is an enormous leap for this court to reach over that concession, to reach over the time bar, to reach over the continuing violations theory and find anything in those performance appraisals that supports a retaliation theory that was never advanced to the district court.

JUDGE FERNANDEZ: But if you're an A student and your professor says, you know, "I don't like Asians," and gives you a C, then one would get a kind of feeling that that was discriminatory; right?

MR. FLICK: Absolutely.

JUDGE FERNANDEZ: If you really are an "A" and they give you a "C." And so he grieves about that. I think he grieved about that.

MR. FLICK: But there's no evidence in the record that either Mr. Brown or Mr. Bilderback ever made such a decision -- or made such a statement that "I don't like Asians." And there's no evidence in the record that any of the individuals involved in the challenged decisions here were involved in what happened in Yee One.

JUDGE FERNANDEZ: How about "I don't like folks who aren't team players and who are always throwing sand in the gears," things along that line? "Don't like non-team players. You really ought to learn to be a team player instead of filing lawsuits. You really ought to stop grieving when I give you a C. You ought to stop grieving it because, if anything, that demonstrates you sure aren't a team player. You don't know how to take it like a man and better yourself. You're just a whiner." Right? How about that?

MR. FLICK: Your Honor, with all due respect, if this court can find any statement such as that in this record, then I

would urge reversal. There is no such statement in this record. No such evidence.

JUDGE TASHIMA: The fact of the matter was, didn't he have the lowest rating of the pool of people who were considered for the layoff?

MR. FLICK: He did in the 1991 performance appraisal. And now, if I may, I'd like to actually address that. Actually, I think I did.

I think I made the point that that -- no, I didn't.

The 1991 appraisal was never an issue in the court below. The first two were. And we talked about how the court disposed of it. The 1991 appraisal, like his first two, is not mentioned in his complaint. As a consequence, it was not the subject of either of the two summary judgment motions. It was never raised in either -- in any of the three opposition memoranda which Mr. Yee presented to the district court. It's not listed in his own statement of genuine issues of material fact at summary judgment. And there's no single reference to it in Judge Pfaelzer's 17-page order granting summary judgment. It was not an issue until we reached this court, and with all due respect to counsel, until Mr. Yee's new counsel decided that it was an essential factual matter that he needed to support the new continuing violations theory. There was no allegation below that that performance appraisal was discriminatory.

JUDGE TASHIMA: Let me change the focus just a little bit.

Even assuming plaintiff doesn't have a viable continuing violations theory because he didn't raise it in the district court, isn't it a fair argument to say that these earlier appraisals are evidence from which you can infer, you know, racial intent in his layoff later?

MR. FLICK: I think that's important --

JUDGE TASHIMA: Isn't that sufficient to overcome summary judgment on the Title VII layoff claim?

MR. FLICK: I think that's the important point, Your Honor. I think we need to distinguish between whether or not something can be a liability-creating event or whether it can be mere relevant evidence which the court can consider with respect to something that is not time barred.

With respect to the '89 and '90 performance appraisals, I think, we win on both issues. It cannot be a liability-creating event because of the reasons I've argued. It also can't be relevant evidence --

JUDGE TASHIMA: Why can't it be?

MR. FLICK: Because Mr. Yee conceded that there was no issue of discrimination. When Mr. Yee says, those appraisals --

JUDGE TASHIMA: You mean in his deposition?

MR. FLICK: In his opposition memorandum at summary judgment, he conceded the issue. So I don't see how this court could conceivably regard them as relevant to anything when he himself says they are not discriminatory. And since he never raised any issue in the court below with respect to the 1991 appraisal, I don't see what that could be relevant to. I think it's clever; it's a clever attempt to try and support the new continuing violations theory, but it was not raised below; and he never alleged that it was discriminatory. So to the extent that the court might consider whether or not they should be considered as relevant evidence, I think he himself has disposed of that argument.

If I may, Your Honor, I'd like to reserve my last three minutes to respond.

JUDGE FERNANDEZ: No. Could we go one, two, three, stop.

MR. FLICK: Okay. I think I've actually addressed all of the substantive issues. I just would close by saying that I recognize the factual and the legal backdrop against which this case, which we've come to call as Yee Two, stands. In my view, though, there was one district judge who was best positioned to consider all of Mr. Yee's allegations and the entire record that was before her against that backdrop. And it was Mariana Pfaelzer. And I think that the record below and the very detailed statements of uncontroverted facts and conclusions of law that she issued make very clear that she looked well beyond the mere two-page opposition memoranda that were submitted. That she did look to the entire record. And that she could find no triable issue. And I don't think that she had any choice but to grant summary judgment on that record.

JUDGE MERHIGE: The response to the motion for summary judgment was almost a giveaway, wasn't it?

MR. FLICK: Yes.

JUDGE MERHIGE: Practically admitted.

MR. FLICK: Yes. And to the extent that there was more to that response in the form of Mr. Yee's genuine statement of -- of -- the statement of genuine issues and material fact, the local rules for the Central District make very clear that that responsive statement has to cite to specific evidence that supports the fact that those are disputed and there is no citation to any evidence whatsoever in that document. It's a list of 10 or 11 restatements of the mere allegations that are in his complaint.

Thank you very much, Your Honors.

JUDGE FERNANDEZ: Thank you. Well, you reserved about four and a half minutes.

MR. SCUDI: Thank you, Your Honor.

There was no stipulation on the record. We reviewed the record in looking for the alleged stipulation conceding, and what we found was that there was a discussion on the record where counsel -- and we cited in our reply brief on page 6, where it basically says, you know, he's just beginning to learn about the performance appraisals. For example, they're used in layoffs. So he didn't really concede anything. What he said is, "I'm not quite sure what this is all about." That's what the counsel said. It's quoted on page 6 in our reply brief.

As to the issue about the question as to whether or not this court can go beyond what was raised in the briefs, on page 7 we cite the Donovan case out of the Ninth Circuit in 1980 for the proposition, at least, that with regard to issues of law like jurisdiction, the court can go beyond what was briefed if there's enough facts in there. So there are facts before the court that will allow it on the jurisdictional issue to go beyond the jurisdiction, saying that there's no continuing violation.

In addition, I would like to focus on the argument that the termination itself is in September of 1992; the EEOC complaint was filed in August 1992; and the denial of the grievance procedure in which -- involved the 1989 and 1990 appraisal evaluations did not occur until March of 1992. And so those three evaluations and the termination of Mr. Yee's in-house appeal in March are the basis upon which the ultimate determination was made to terminate Mr. Yee. And those give the court enough in, and of themselves, to meet a Title VII discrimination count. And, clearly, all of those things are within the record. And, clearly, all of those would

not be timed barred. However, by reviewing those things, it does bring back in, and you do look at, the evaluations from 1989 and 1990. And remember that those are performed the year after that evaluation.

I would also indicate to the court that, within its discretion, the case may be remanded for further proceedings; and that may be an alternative to a reversal.

JUDGE MERHIGE: If you're right, wouldn't that be the proper procedure?

MR. SCUDI: That would be the -- we would be delighted with that result, Your Honor. And we believe that it's justified in this case. And, really, if you look at -- I think if you look at Donovan and you could look at the line of cases in terms of the court of appeals looking at issues of law and reviewing the factual records before them, we're not asking the court to go beyond its power. We're not asking the court to go beyond what's dictated in the Ninth Circuit with regard to the review. But we are asking the court, because this is a fundamental right, we are asking the court to take a close look at this. It is discrimination against a minority. And as a result, we are asking the court, then, to remand this matter.

I would also indicate that certainly in terms of the time issues with regard to the breach of the covenant of good faith and fair dealing in the 1981 action for breach of contract, those claims are not time barred. And so you really don't have to address those issues in terms of the time-barred ruling with regard to continuing violation. And we believe that we've established at least issues of fact as to all those as well.

So we would ask the court -- cordially ask the court to remand this for further proceedings. Thank you.

JUDGE FERNANDEZ: Thank you, counsel. This matter will stand submitted.

(End of tape.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I, Daisy H. Eng, Certified Shorthand Reporter, Certificate No. 6593, for the State of California, hereby certify:

I transcribed to the best of my ability the audio tape in the foregoing matter.

Dated: January 24, 1997.

DAISY H. ENG
Certified Shorthand Reporter No. 6593